

DONTZIN NAGY & FLEISSIG LLP

31 E 62nd Street, Floor 7 | New York, New York 10065 | (212) 717 - 2900

Gregory N. Wolfe
greg@dnflp.com

VIA ECF

December 6, 2023

Hon. Kevin P. Castel
United States District Court Judge
Southern District of New York
500 Pearl Street, Courtroom 11D
New York, NY 10007

Re: *Sphere 3D Corp. v. Gryphon Digital Mining, Inc.*, 1:23-cv-02954-PKC

Dear Judge Castel:

We represent Plaintiff Sphere 3D Corp. ("Sphere"). We write pursuant to this Court's Individual Practices in response to Defendant Gryphon Digital Mining, Inc.'s recent pre-motion letter requesting a conference on its motion seeking leave to amend its answer. *See* Dkt. 50. No conference is currently set before the Court.

Sphere's position is that the proposed additional contract Count is defective. However, in light of the liberal standards governing the amendment of pleadings and the guidance from the Second Circuit that, as a general matter, deficient amended claims should be dealt with on motions to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure ("Rule 12"), as opposed to on motions to amend on the ground of futility, Sphere does not oppose Gryphon's request for leave to amend. *See Toussie v. Williams & Connolly, LLP*, 2022 WL 182374, at *6 n.5 (E.D.N.Y. 2022) (holding, in light of "the preference of the Second Circuit to resolve cases on the merits," that "the best course" is to permit amendment "so that the merits may be reached" on a motion to dismiss). Should the Court permit amendment, Sphere intends to move to dismiss the newly added claim pursuant to Rule 12.

We are available to discuss these issues at your Honor's convenience.

Respectfully submitted,

/s/ Gregory N. Wolfe

Leave to amend
is granted to defendant
Gryphon to amend its
counterclaim to add a
claim for breach of contract
provided they are filed within 7 days
of the entry of this Order.
Letter motion (ECF 50) is terminated.
SO ORDERED.
J. M. USA J 12-7-23